No. 08-815

In The Supreme Court of the United States

ROBERT DEUPREE,

Petitioner,

v.

THE WORKERS' COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA, UNINSURED EMPLOYERS BENEFITS TRUST FUND, and MON DOE 43,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Second Appellate District

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI (RULE 15.6)

SCOTT WM. DAVENPORT*
STEVEN J. RENICK
MANNING & MARDER, KASS, ELLROD, RAMIREZ LLP
19800 MacArthur Blvd., Ste. 600
Irvine, CA 92612
Telephone: (949) 440-6690
Facsimile: (949) 474-6991

Attorneys for Petitioner, Robert Deupree

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

The Status of the Factual Record 1

Respondent's Misleading Statements Need To Be Corrected 2

The Opposition Constitutes a Graphic Example of What the California System Permits 4

LEGAL ARGUMENT 5

CERTIORARI IS NECESSARY TO RESOLVE THE FUNDAMENTAL DUE PROCESS VIOLATIONS WHICH ARE OCCURRING AT THE CALIFORNIA WORKERS' COMPENSATION APPEALS BOARD 5

A. Constitutional Guarantees of Due Process and Equal Protection 5

B. The Issues Presented in This Case Are Worthy of Certiorari 7

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES

Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938) 5, 6

Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387 (1923) 7

Rice v. Sioux City Cemetery, 349 U.S. 70 (1955) 7

Samson v. California, 547 U.S. 843 (2006) 7

STATUTES

California *Labor Code*

Section 3202.5 3

Section 5708 5

OTHER SOURCES

United States Supreme Court Rule 10 8

INTRODUCTION

Respondent asserts that this Court should deny the Petition for a Writ of Certiorari for a number of reasons. However, in so doing, respondent makes numerous factual and legal misrepresentations which need to be corrected prior to addressing the substance of their Opposition.

The Status of the Factual Record

Contrary to the statements contained in the Opposition, there are no controverted facts; rather, there is a difference of opinion as to what these uncontroverted facts mean. Specifically, during her case-in-chief, respondent presented testimony of various individuals who relayed unsubstantiated double and triple hearsay, unsupported by any other evidence.

For example, respondent states that the facts indicate that Mark Wallace forged his HIV test. Opposition at 1. However, as stated in the petition, the only "evidence" of this came from the industry gossip, speculation, and innuendo. See Petition at 4-9.

Likewise, the testimony of individuals who opined that Wallace was the source of an HIV outbreak – based on industry scuttlebutt, newspaper articles, and MTV programming – is similarly lacking in corroboration. *Id.*

The question is not whether hearsay evidence is admissible. It is. The question is whether an administrative system which allows large monetary awards to be made based solely on unsubstantiated double and triple hearsay, unsupported by any other evidence, comports with due process. It doesn't.

Respondent's Misleading Statements Need To Be Corrected

Petitioner also notes a significant problem in respondent's repeated skilled use of artful language to misrepresent the true facts and distract the Court. For example, respondent incorrectly states that petitioner is asking this Court to exercise equity jurisdiction and that this Court should reject this invitation because petitioner has unclean hands. Opposition at 1. This argument is little more than a thinly veiled attempt to sling mud, however.[1] The fact is that petitioner is asking this Court to exercise its

---

[1] Petitioner has never disputed that he did have workers' compensation insurance but argued that he was not required to do so as he sold his entire interest in the corporation by virtue of the stock transfer agreement. However, following trial, the court found against petitioner on this issue, concluding that notwithstanding the stock transfer agreement, petitioner was an equitable owner of the corporation. App. 14. While petitioner disagrees with this factual finding, he recognizes that it presents no federal constitutional issue and, accordingly, it is not part of this proceeding.

oversight function to ensure that all litigants are afforded their fundamental right to due process.

Respondent also doggedly regurgitates the mantra that Doe's evidence – flimsy though it was – was "unrebutted." Opposition at 2-3. This argument belies a complete lack of understanding of trial procedure, due process, and equal justice under the law.

In this case, respondent had the burden of proving that she suffered an industrial injury. California *Labor Code*, § 3202.5. Defendant was under no obligation to refute evidence which was so lacking in any indicia of trustworthiness that no competent court system would rely upon it to issue an award.

Finally, respondent incorrectly states that at no time did petitioner "bring up the issue to the California courts that there was a denial of due process as a result of hearsay evidence." Opposition at 3. This assertion is blatantly false.[2]

---

[2] "Despite having four opportunities to do so, DOE has never responded to the challenge to point to any admissible evidence whatsoever which would refute this simple sufficiency of the evidence claim. [¶] **This case – and the issuance of two summary denials – presents a troubling example of how defendants are being denied their fundamental due process right to meaningful review.**" Reply in Support of Petition for Review at 5, emphasis added.

"[The granting of the petition for review] would be completely consistent with the Court's oversight capacity of the Workers' Compensation Appeals Board and would ensure that proper guidance is given as to the quantum of evidence which

(Continued on following page)

The Opposition Constitutes a Graphic Example of What the California System Permits

One final threshold issue warrants comment: the nature of respondent's opposition. In this case, the Court will note that this pleading does not contain a single citation to the record and, in fact, there is no evidence to support almost any representation made in the pleading. Moreover, the brief cites to a single case and a single California statute. This mirrors exactly what was done in the California courts.[3]

Simply stated, respondent's briefing – both at this level and all prior levels – is not adequate proof of anything and is not helpful in the least to any Court charged with reviewing for legal error. Yet, not a single judge through three levels of review ever raised an eyebrow. There clearly is a fundamental flaw in a system when a case like this passes through without even a comment.

---

must be presented before a finding can be reached. In the absence of such action, defendants will be deprived of the due process which should be afforded to all litigants, not just applicants." Reply in Support of Petition for Review at 6, emphasis added.

[3] Indeed, when faced when petitioner's challenge to dispute the nature of the record before the California Supreme Court, respondent curtly replied, "This brief will not refer directly to the pages and lines in the Minutes of Hearing or transcript for the sake of brevity." Answer to Petition for Review, at 4.

LEGAL ARGUMENT

CERTIORARI IS NECESSARY TO RESOLVE THE FUNDAMENTAL DUE PROCESS VIOLATIONS WHICH ARE OCCURRING AT THE CALIFORNIA WORKERS' COMPENSATION APPEALS BOARD

A. Constitutional Guarantees of Due Process and Equal Protection

As stated in the petition, the question presented is not whether hearsay evidence is admissible. It is. California *Labor Code*, § 5708. However, as stated in *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229-230 (1938), due process requires more than "remote hearsay" and "mere rumor."

The sad fact is that Administrative Law Judges in California have grown complacent in their obligation to protect the due process rights of all litigants who appear before them – not just workers who claimed they were injured at work. Hearsay objections are perfunctory in general and Courts simply do not attempt to determine the trustworthiness of the hearsay, in direct contravention of this Court's requirements as set forth in *Consolidated Edison*.

Respondent attempts to distract from the true issue in this case by stating that the trial court's determination on the *admissibility* of the evidence is unassailable. This statement is pragmatically true in that it would be virtually impossible to convince any court of superior jurisdiction that a Court erroneously admitted evidence which is statutorily admissible

under the state's Evidence Code. However, this is not the end of the inquiry.

Rather, the validity of the trial court's determination rises and falls on whether the hearsay upon which the Court relied has "a basis in evidence having rational probative force." *Consolidated Edison, Co., supra,* 305 U.S. at 230.

Contrary to the unanimous opinion of the California trial and appellate courts, evidence gleaned from Doe's friends, The Los Angeles Times, CNN, MTV or Adult Video News – if relayed by someone who was aware of the publication – does not constitutes "a basis in evidence having rational probative force" where there is simply no other foundation, personal knowledge, or any other indicia of reliability upon which to base the decision. See Petition at 4-9.

In light of this undisputed record[4] in this regard – which was produced in its entirety verbatim in the petition – neither the trial court nor any of the three subsequent levels of appeals expressed any concern whatsoever about the quantum of evidence presented or its probative force. This failure speaks volumes to the systemic constitutional deprivations which are routine in the California Workers' Compensation System and which undermine public confidence in the system as a whole.

---

[4] Tellingly, respondent does not provide any citation to any contrary or additional evidence which would support her claim, nor can she, as none exists.

B. The Issues Presented in This Case Are Worthy of Certiorari

Finally, respondent asserts that due process was provided, that the constitutionality of the California system has never been questioned, and that certiorari is unwarranted, as evidenced by the fact that no prior court has even bothered to issue an opinion. This contention begs the question, however.

It is beyond dispute that many cases accepted by this Court were unpublished or came directly from an intermediate appellate court. See, e.g., *Samson v. California*, 547 U.S. 843, 846 (2006) [unpublished case from the California Court of Appeal].

Moreover, the importance of a case relates to the importance of the issues "to the public as distinguished from" importance to the particular "parties" involved. *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923); *Rice v. Sioux City Cemetery*, 349 U.S. 70, 79 (1955). This case presents such an issue. This is not merely a fact-bound opinion about whether an injured worker should be entitled to receive compensation for her alleged industrial injury, but rather whether a party to such a proceeding who presents a case based solely on substantiated double and triple hearsay, unsupported by any other evidence, satisfies due process.

This Court can mark a brighter line and provide guidance for those administrative agencies – both in California and the rest of the nation – which are grappling with similar issues. Innuendo and rumor

does not become fact merely because it was reported on MTV or in Adult Video News.

Accordingly, certiorari is necessary to resolve these important questions regarding the proper administration of due process at administrative hearings, which conflict with prior precedent of this Court. United States Supreme Court Rule 10.

CONCLUSION

For all the foregoing reasons, petitioner respectfully requests that this Court **grant** the Petition for a Writ of Certiorari.

Respectfully submitted,

MANNING & MARDER,
KASS, ELLROD, RAMIREZ LLP

SCOTT WM. DAVENPORT*
STEVEN J. RENICK

Attorneys for Petitioner,
Robert Deupree

**Counsel of Record*